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May 23, 2005

Michigan Supreme Court
Office of the Clerk
P.O. Box 30052
Lansing, Michigan 48909

Via E-Mail and US Mail

Re: ADM File No. 2003-62

Dear Justices:

I was a member of the Standing Committee on Professional and Judicial Ethics, and a member of the subcommittee that evaluated the ABA's "Ethics 2000" proposal and reported to the full Committee.

My background includes representation of large law firms in malpractice cases; advising on professional responsibility issues; representation of corporate clients in matters relating to unauthorized practice of law; and participation in other relevant activities on a state and national level.

During the deliberations of the Committee and its subcommittee on the proposed rules, there was spirited debate on a number of provisions, and many of the Committee's recommendations were decided by narrow margins. Unfortunately, the State Bar lawyer who led those committee discussions decided that the Committee should speak by consensus and that a minority report should not be prepared.

While many provisions of the proposed rules deserve comment, I write to comment on two specific issues where there was disagreement on the Committee. First, proposed Rule 1.0 and the question of whether the rules of professional conduct have any place in civil litigation. Second, the "confirmed in writing" requirement of proposed Rules 1.7(b), 1.9(b), 1.10(d), 1.11(a) and (d), 1.12, and 1.18(d).

My comments reflect my personal positions on the two issues, and I do not purport to speak on behalf of any other member of the Committee or subcommittee.

Rule 1.0 and the Use of the MRPC in Civil Litigation

I encourage the Court to review the briefs filed under seal in a pending appeal (Court of Appeals Docket No. 258669), and in a related Supreme Court file (Docket No. 127409), in which various considerations as to the use of the MRPC in civil litigation have been briefed.[1]

In the matter on appeal, the trial court held that a client's breach of fiduciary duty action against its lawyers was an impermissible attempt to enforce the MRPC, and dismissed the case for lack of subject matter jurisdiction. If affirmed, this holding would mean that a client's claim for redress for a lawyer's breach of duty cannot be heard in any forum, and that law firms (which as entities cannot be grieved under the MRPC) are completely immune from liability in any case where individual lawyers at the firm could conceivably be grieved for the same conduct. This is an absurd result that must be rejected. Certainly this Court should not adopt a rule that would compel such a result.

Long before Michigan's adoption of the Canons of Ethics (in 1935), or the subsequent Code of Professional Responsibility (in 1971), or the current Rules of Professional Conduct (in 1988), or the proposed revised rules now being considered by this Court, it was recognized that lawyers are fiduciaries for their clients and that among their duties to their clients are the duties of loyalty, confidentiality, honesty and competence. Breaches of those duties historically have been enforceable in equity or at law, under tort, contract, or breach of fiduciary duty theories. In this increasingly complex world, the rules of professional conduct serve the admirable purpose of bringing shape and definition to the scope of a lawyer's duties, principally for the benefit of clients. But it turns self-regulation on its head to argue that the rules provide offending lawyers with immunity from civil suits by clients when the duties defined by the rules are breached.

The Attorney Grievance Commission and Attorney Discipline Board exist to scourge our profession of rascals and incompetents. That process is accomplished by orders of discipline and by suspension or disbarment. But clients injured by the disloyal or negligent conduct of their attorneys should be able to sue in court for damages or to enjoin disloyal conduct, and in the process show that the duties described in the MRPC were breached. The process is analogous to the system that punishes and suspends driving privileges for negligent drivers. Only law

[1] As a matter of disclosure, I am one of the counsel for the appellant in that matter. The Court should also be aware that the only other comments on proposed Rule 1.0 (submitted July 30, 2004 and January 26, 2005) were from two individuals who did not disclose their significant connections to the appellees in that same case. Unsurprisingly, both urged that the proposed rule be strengthened to prohibit reference to the MRPC in civil litigation. Those comments should not be considered without an understanding of the issues presented in the appeal.

enforcement officials may scourge reckless drivers from the roads by suspending driving privileges. But victims of negligent motorists may seek damages and may in the process show that the defendant motorists were disobeying speed laws or disobeying traffic signals.

If civil actions may not be brought where the MRPC have relevance to a lawyer's conduct, are the lawyer and his law firm immune from civil liability where the lawyer failed to provide competent representation, undertook a legal matter the lawyer was not competent to handle, handled a legal matter without preparation adequate in the circumstances, or neglected a legal matter, in violation of MRPC 1.1? Where the lawyer failed to act with reasonable diligence as required by MRPC 1.2? Or failed to communicate as required by MRPC 1.3? Or converted trust property by commingling due to the lawyer's failure to maintain trust accounts as required by MRPC 1.15? Or undertook a matter directly adverse to an existing client as prohibited by MRPC 1.7? Clients may only obtain redress in these circumstances by bringing actions in court against the lawyers and law firms who have harmed them. Grievances are not an adequate substitute. The civil actions are premised on long-existing common law and contract duties even though the lawyers' standards of conduct are now in part defined and informed by the MRPC. The MRPC are thus relevant and should be admissible in civil litigation, and circuit courts should have jurisdiction over such cases.

I urge the Court, after review of the appellate briefs mentioned above, to reject any suggestion that Rule 1.0 should be changed to prohibit reference to the MRPC in civil proceedings or to prohibit civil suits by clients against lawyers or law firms where violations of the MRPC are relevant to the lawyers' conduct and the scope of their duties.

The "Confirmed in Writing Requirement"

The proposed rules include a "confirmed in writing" requirement in proposed Rules 1.7(b), 1.9(b), 1.10(d), 1.11(a) and (d), 1.12, and 1.18(d).[2] The ABA's Ethics 2000 Commission and the Committee apparently felt that the "confirmed in writing" standard was appropriate because it would provide evidence of certain important understandings between a lawyer and client. These are "best practices" considerations that do not belong in rules of conduct that impose minimum standards and are quasi-criminal in nature. I support John Allen's comments on this subject.

If confirmation in writing is a required element of "consent" under the rules, then a lawyer's inadvertent failure to document the consent timely or to some

[2] The definition in proposed Rule 1.0(b) could be retained, because the phrase is used elsewhere in the rules, e.g., Rule 1.5(d) governing the sharing of fees between lawyers not in the same firm.

indeterminate level of specificity may obviate the consent, even where it is undisputed that the involved clients consented orally and were fully informed. If that is the result, then the lawyer's conduct could be measured as if he or she had not sought or obtained a consent at all.

The Chicago Bar Association and the Illinois State Bar Association formed a Joint CBA/ISBA Committee on Ethics 2000. The Final Report of the Joint Committee, dated October 17, 2003, concluded that it is inappropriate to have a "confirmed in writing" requirement in the rules:

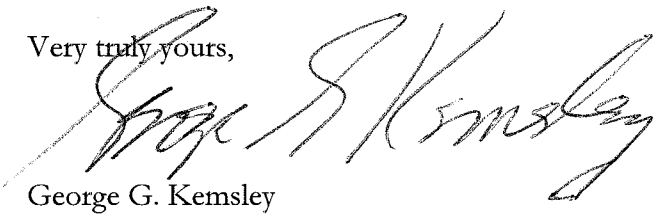
> "The model rule requires waivers of conflicts (i.e., client consents) to be in writing. That would be a significant change from the current Illinois rule. Although written conflict waivers are clearly desirable in many situations, requiring written consent in every situation as a matter of discipline is both unnecessary and inappropriate. Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. The need for a consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question whether consent was given. Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing--when it may be entirely clear that the consent was in fact given--is not reasonable. Accordingly, the Committee recommends that the rule and comments be revised to eliminate the requirement that conflict waivers be in writing." (Final Report, Summary of Action, Rule 1.7, page 16).

The CBA/ISBA comment is an articulate summary of the reasons that I and many other lawyers from private practice law firms oppose the requirement of a confirmation in writing.

I respectfully request that the Court omit any "confirmed in writing" requirement in the proposed rules.

I would be pleased to respond further on either of these points if the Court desires.

Very truly yours,



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